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## CHAPTER: Compliance Laws and Regulations

### SECTION: Advertising

### Section 425

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#### Introduction

The Federal Reserve Board's Regulation DD, which implements the Truth in Savings Act, contains detailed advertising provisions that apply all savings associations. Subsequent to publication of the new regulation, the OTS amended its advertising regulations in order to eliminate conflicting, duplicative, or obsolete regulatory provisions. Since Regulation DD contains the newly adopted advertising provisions, §563.27(a) of the OTS Regulations was removed.

In addition, obsolete §§563.29 and 563.27(b)(2) were removed from the OTS Regulations. Since both insurance funds are governed by the same FDIC rules, OTS determined that the corporate title and name restrictions contained in the above-cited sections were no longer necessary for consumer protection. The revised regulation §563.27 only addresses the accuracy of savings associations' advertising of services, contracts, investments, and financial condition. Refer to Section 365 of this handbook for information on Truth in Savings.

Part 328 of the Federal Deposit Insurance Corporation regulations also apply to insured savings associations.

#### Requirements

##### Advertising of Services, Contracts, Investments or Financial Condition

Section 563.27 restricts any kind of advertisement or representation that is inaccurate or in any way misrepresents the savings association's services, contracts, investments, or financial conditions. This section defines advertising as including print or broadcast media, displays and signs, stationery, and all other promotional materials.

##### *Misleading advertising regarding tax-deferred annuity plans*

Savings associations offering annuity plans through their service corporations, where an un-

derwriting insurance company receives for their reinvestment purposes the depositors-annuitants' invested funds, must ensure that the associations' advertising of such accounts are not misleading.

To meet the requirements of §563.27, that advertising must be accurate and must avoid misrepresentation, SAIF-insured associations that advertise such tax-deferred annuity plans:

- must affirmatively state that the investments are not insured; and
- may not imply that the annuity is an "account" in the association. In describing such annuity plans, this prohibition would preclude the use of such terms as "account," "deposits," "savings," "savings instruments," "savings products," and the like.

These requirements do not apply to annuity plans wherein the invested funds are held as SAIF-insured savings accounts in an association, such as where an insurance company acts as an agent for a depositor-annuitant, or where the depositor-annuitant's SAIF-insured savings account is held by a custodian in trust for an insurance company.

##### Advertisement of Membership

Savings associations insured under the FDIC's Savings Associations Insurance Fund (SAIF) are also subject to the FDIC's rules regarding advertisement of membership (12 CFR 328). Section 328.1(b) specifies the size and design of the official sign that SAIF-insured savings associations must use. Generally, §328.4(a) requires that this sign be continuously displayed in a savings association at each station or window where insured deposits are usually and normally received in its principal place of business and at all of its branches (except at automated service facilities including automated teller machines, cash dispensing machines, point-of-sale terminals, and other electronic facilities where deposits are received). Section 328.4(b) includes specific information as to how a savings association may obtain official signs. Savings associations are prohibited from

displaying the FDIC official bank sign at its principal place of business or at any of its branches.

### **Advertising of Debt Securities**

Savings associations' advertisements of debt securities are subject to Rule 134 and 135 issued under the Securities Act of 1933. These Rules are applied to savings associations' offerings through the securities offering regulations at 12 CFR 563g.

The OTS has also issued a Sales of Securities regulation at §563.76. This section generally prohibits the sale of debt or equity securities issued by a savings association or its affiliates in the offices of the savings association. A limited exception applies to the offer and sale of equity securities during a mutual to stock conversion. Other limited exceptions are enumerated in Thrift Bulletin 23a.

Part 563g generally prohibits any offer or sale of a security unless the offer or sale is accompanied or preceded by an offering circular that meets certain specified requirements and is filed with and declared effective by the OTS. However, several exemptions are available under the regulations, such as if the offer involves certain fully collateralized securities, is made in a non-public offering, or involves a security that is exempt from registration. In addition, certain communications (e.g., media advertisements, sales literature and other forms of publicity) are not considered to be an offer if (1) prior to the filing of an offering circular the requirements of SEC Rule 135 are met, or (2) subsequent to the filing an offering circular, the communications satisfy the requirements of SEC Rule 134.

Thrift Bulletin 31-2 provides guidance on the advertising of debt offerings and equity securities. As stated in TB 31-2, the following is a list of permitted and required disclosures:

#### *Permitted Disclosures*

1. The name of the issuer;
2. The title of the security;
3. The amount of the securities being offered;

4. A brief indication of the general type of business of the issuer;
5. The price of the security, the method by which the price will be determined, or probable price range;
6. If a fixed interest debt security, the yield, or the probable yield;
7. The name and address of the sender of the communications and the fact that the sender is participating in the distribution of the security (if true);
8. The names of the managing underwriters, if any;
9. The approximate date upon which the distribution will commence;
10. Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies or other investors under the laws of any state;
11. Whether, in the opinion of counsel, the security is exempt from specified taxes;
12. Whether the security is being offered through rights, and if so, certain information about the rights offering;
13. Any statement or legend required by state law or administrative authority;
14. For debt securities or preferred stock, the rating from a nationally recognized statistical rating organization and the name of the rating agency, if any.

#### *Required Disclosures*

1. If the registration statement (offering circular) has not yet become effective, a prescribed legend is mandated;
2. A statement whether the security is being offered in connection with a distribution by the issuer, or by a security holder, or both, and

whether the issue represents a new financing, or refunding, or both;

3. The name and address of a person or persons from whom a written prospectus meeting the requirements of the Securities Act (Part 563g in the case of securities issued by a savings association) may be obtained.

In addition, for “over-the-counter” debt offerings, i.e., where the security may be purchased at or through facilities of the savings association or an affiliate of the savings association, the following disclosures must be included in all communications in order to avoid their being considered materially misleading:

- a. A legend, in type at least as large as the largest type size used in the communication, that the security is not federally insured;
- b. A statement that the investment in such debt securities is subject to certain “investment considerations” or “risk factors” (whichever is appropriate), such as the absence of any indenture, trustee, or market for the securities, the fact that the securities are unsecured and subordinated to all other obligations of the institution, the probability of redemption if interest rates decline, etc.
- c. A statement that any “Cash Bonus” or “Cash Premium” offered as a sales incentive could result in certain tax consequences to the purchaser.
- d. A legend stating that potential investors should obtain and read a copy of the offering circular before making an investment in the securities.

#### *Disclosures Not in Compliance with Rule 134*

1. Statements designed to have or having the effect of implying that the security is an insured account (i.e., statements that the yield or interest rate of the security being offered is “higher than those offered on our other insured accounts”);

2. Statements comparing the security being offered to insured accounts available at the savings association, including attention-getting headlines;
3. Statements implying that the security is likely to remain outstanding until “maturity” (since if the savings association is able to borrow money more cheaply elsewhere, it will likely immediately redeem these high-interest rate debt securities).

### **Examination Objectives**

To determine if the savings association’s advertisements are accurate, not misleading, and in compliance with applicable rules.

To determine if the savings association’s advertising of debt securities is accurate, not misleading, and in compliance with applicable rules.

### **Examination Procedures**

1. Review copies of the savings association’s advertisements to determine if they are accurate and fairly represent its services, contracts, investments, and/or financial condition, and are not in any way misleading.
2. Determine if the savings association is properly displaying the official sign for SAIF-insured savings associations as required by FDIC regulations.
3. For debt securities:
  - a. Review copies of the savings association’s advertisements to determine that they clearly disclose the features of the secured debt instrument and comply with the advertising requirements.
  - b. Determine if the savings association sells its securities “over-the-counter”; if so, determine if all communications materials disclose that the security is not federally insured, and is subject to certain “investment considerations” or “risk factors.”

- c. If a “Cash-Bonus” or “Cash Premium” is offered as a sales incentive for purchasing debt securities, determine if all communications state that the receipt of such a bonus could result in certain tax consequences to the potential purchaser.
- d. Determine if all communications relating to the sale of secured debt include a legend stating that the potential investor should obtain and read a copy of the offering circular before making an investment in the security.
- e. Determine if any communication material contains information which may mislead the general public as to the nature of the debt security or makes comparison to an insured account offered at the savings association.
- f. Determine if any communication material makes a statement which implies that the security is likely to remain outstanding until “maturity.”

References

*Regulations*

12 CFR 563.27	Office of Thrift Supervision, Department of the Treasury, Operations Regulation, Advertising
12 CFR 563.76	Office of Thrift Supervision, Department of the Treasury, Offers and Sales of Securities
12 CFR 563g	Office of Thrift Supervision, Department of the Treasury, Securities Offerings Regulation
12 CFR 328	Federal Deposit Insurance Corporation, Advertisement of Membership Regulation

*Memoranda, Bulletins, Resolutions, and Opinions*

TB 23a	Sales of Securities
TB 31-2	Application of Securities Offering Rule to Materials for Offering of Debt